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Utah Court of Appeals

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20060787-CA

UTAH COURT OF APPEALS

MARK HOPKINS and KATHY HOPKINS
d.b.a. ELKRIDGE FINANCIAL

Plaintiffs and Appellants,

vs.

BILL HALES,

Defendant and Appellee.

Appeal from the Final Order and Judgement of the
Sixth Judicial District Court, Sanpete County
State of Utah, by the Honorable David L. Mower

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ARGUMENT

APPELLEE MISAPPREHENDS APPELLANT'S ARGUMENT AND MISAPPLIES THE LAW.

Appellants have not challenged any Findings of Fact and are thus not required to marshal the evidence on appeal. Appellants have indeed embraced the trial Court's findings that the contracts were entered into in bad faith. That is not the same as bringing an action in bad faith. Appellant does not rely on Utah Code Annotated § 78-27-56.5 as a basis for appeal. Appellant simply attempts to distinguish the differences between Utah Code Annotated §78-27-56 and § 78-27-56.5. Appellant's argument is clearly focused on Utah Code Annotated § 78-27-56 and it's evolution.

In order to avoid confusion and or needless litigation this court should adopt a bright line policy or precedent that deals specifically with bad faith or frivolous litigation as it relates to Utah Code Annotated § 78-27-56. That bright line precedent should be that "when two parties freely and voluntarily enter into and or acknowledge a contract between the parties and based upon an apparent breach of the contract by one party or the other it is not bad faith or frivolous for the other party to bring suit for enforcement of that contract". This is a common sense approach to this issue inasmuch as after a contract has been entered into, it is only reasonable that a non-breeching party would seek enforcement in the courts. The validity of the contract or the obligations thereunder should not prevent a party from seeking enforcement through the courts.

In this case appellee attempts to claim that the alleged non performance of the two contracts by appellant renders this action brought in district court, by appellants, frivolous or in bad faith.

In *Holmes v. American States Ins. Co.* 1 P.3d 552 (Utah Ct. App. 2000) the court stated “When examining a statute, we look first to it’s plain language as the best indicator of the legislature’s intent and purpose in passing the statute.” In this case the language of Utah Code Annotated § 78-27-56 is plain, it provides:

In civil action, the court shall award reasonable attorney’s fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith...

Here attorney’s fees may be awarded if the action (lawsuit) or the defense to the action (lawsuit) was brought or asserted without merit nor asserted in good faith. This provision does not cover incidents, contracts or conduct which precipitate the action. If this court were to expand this rule to be read as appellees would ask, then this court would open the flood gates to litigation over attorney’s fees in every case. Both sides of a litigation would be fighting over whether the underlying conduct of either party was in good faith or without merit. This clearly was not the intention of the legislature. The legislature intended that when a person brought suit or defended a suit with out merit or not in good faith and burdened the court or the other party needlessly then that party should be punished by having to compensate the other party his or her attorney’s fees.

This position has been stated clearly by the Utah Supreme Court in *Bilanzich v. Lonetti*. Ut. Sup. Ct. 20060017, In footnote 7 of this opinion the court states:

For example, Utah Code section 78-27-56 allows District Courts to award attorney fees in order to discourage frivolous and bad faith litigation.

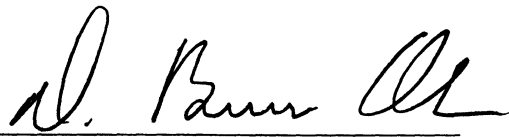
The award of attorney’s fees in the trial court was not based on the merits of the action being

meritless or asserted in bad faith, but, rather the conduct of the parties in entering into the contract. The claim for attorney's fees has been a long hard battle. The appellees have completely disregarded the plain reading of the statute. The appellees have not argued for a change or modification in the law but rather enforcement in an unenforceable fashion. Their position has been pursued in bad faith and has been frivolous and Appellants should be awarded their attorney's fees on appeal.

CONCLUSION

Based on the parties' Briefs this court should remand for further proceeding to the District Court based upon its ruling.

RESPECTFULLY SUBMITTED this 28th Day of August, 2007



D. BRUCE OLIVER
Attorney for Plaintiffs - Appellants

CERTIFICATE OF SERVICE.

I, D. Bruce Oliver, hereby certify that on this 28th Day of August, 2007, I mailed two true and correct copies of the foregoing **REPLY BRIEF OF APPELLANTS**, postage prepaid, to:

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